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Editor-in-Chief, HUBERT D. HENRY, 620 E. and C. Bldg., Denver 2, Colo.
Editor of Dictaphun, BENJAMIN C. HILLIARD, JR., 515 Midland Savings Bldg., Denver 2, Colo.

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Subscriptions, DONALD M. LESHER, Secretary, Denver Bar Association, 808 E. & C. Bldg., Denver 2, Colo.

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Amended Rules of Civil Procedure

On December 28, 1944, at an en banc session of the Supreme Court the following amendments to the *Rules of Civil Procedure* were unanimously adopted to become effective February 28, 1945:

RULE 4

"(f) *Personal Service Outside the State.* Personal service outside the state may be made:

"1. In any action, upon a natural person over the age of 18 years who is a resident of this state by delivering a copy of the process, together with a copy of the pleading upon which it was issued, to the person served. (From Wyo. Comp. Stat. 1920, Secs. 5636, 5641.)

"2. In any action, upon a person domiciled in this state, other than a natural person, by delivering a copy of the process, together with a copy of the pleading upon which it was issued, in the manner provided by this rule for personal service in this state upon such person.

"3. In any action affecting specific property or status or in any other proceeding in rem, upon a natural person of any age, without regard to his residence, or upon any other person, without regard to its domicile, by delivering a copy of the pleading and process thereon, in the manner provided by this rule for personal service in this state upon such person. Service under this paragraph 3 upon a natural person under the age of 18 years may be made by delivering a copy of said pleading and process to such person and another copy thereof to the other person designated by subparagraph (e) (2) of this rule, wherever, within or without this state, such other person may be found. (From Code, Sec. 45.)

"4. No provision of this subdivision (f) shall be construed to limit the right to serve process in any other manner authorized by this rule.

"(g) * * *

"(2) * * *

"(iv) Non-residents of the state; persons who have departed from the state without intention of returning; persons who conceal themselves to avoid service of process; or persons whose whereabouts is unknown and who cannot be served by personal service in the state. (From Code Sec. 45 (b).)

"(h) *Publication.* The party desiring service of process by publication shall file a motion verified by the oath of such party or of some one in his behalf for an order of publication. It shall state the facts authorizing such service, and shall show the efforts, if any, that have been made to obtain personal service within this state and shall give the address, or last known address, of each person to be served or shall state that the same is unknown. The court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state, or that efforts to obtain the same would have been to no avail, shall order publication of the process in a newspaper published in the county in which the action is pending. Such publication shall be made for four weeks. Within 10 days after the order the clerk shall mail a copy of the process to each person whose address has been stated in the motion. Service shall be complete on the day of the last publication. If no newspaper be published in the county, the court shall designate one in some adjoining county. (From Supreme Court Rule 14A, Code Secs. 45, 46, 47 and 50.)"

RULE 98

"(c) *Venue for Tort, Contract and Other Actions.* Except as provided by subparagraphs (a) and (b) of this Rule, an action shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the county where the plaintiff resides when service is made on the defendant in such county; or if the defendant be a non-resident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant is about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had; provided, however, that an action on book account or for goods sold and delivered may also be tried in the county where the plaintiff resides or where the goods were sold; an action upon contract may also be tried in the county in which the contract was to be performed; an action upon note or bill of exchange may also be tried in the county where the same was made payable; and an action for tort may also be tried in the county where the tort was committed. (From Code, Sec. 29.)"

RULE 111

"(c) *How Obtained.* To obtain a writ of error a party shall within the time fixed by this rule docket the case in the supreme court either by filing a praecipe for a writ of error or by filing a record of the proceedings in the trial court prepared in compliance with Rule 112. *There shall also be filed with the record a designation of parties, which lists the names of the plaintiffs in error and of the defendants in error.* Where the record is not filed at the time of the docketing, the clerk of the

supreme court shall issue and transmit to the clerk of the trial court a writ of error commanding that a correct transcript of the record of the case be certified to the supreme court within 60 days from the receipt of such writ, or within such additional time as the supreme court may order. Where the record is filed at the time of the docketing, the clerk of the supreme court shall issue a writ of error and shall file the same with the record of the case. (Part new and part from Supreme Court Rule 19.)"

RULE 115

"(i) *Number of Copies to Be Filed and Served.* One original copy of every typewritten brief and typewritten abstract, and one original copy of every motion shall be filed. Two copies of each printed brief, abstract, or other printed paper, and one copy of each typewritten paper shall be served on all parties, and proof of service filed with the clerk. No such service shall be required upon a defendant in error who has not entered his appearance in the supreme court as stated in the summons to hear errors, but in lieu of such service one additional copy of each such paper shall be filed. (From Supreme Court Rules 38 and 46.)

NOTE

"For service see Rule 5. See also subdivisions (a) and (b) of this Rule 115."

THE COLORADO CONSTITUTION

On January 2 a luncheon was held at the Olin Hotel for the incoming General Assembly of Colorado. At that time it was addressed by William W. Grant, Edward L. Wood, Allen Moore, and Philip S. Van Cise on the necessity for a constitutional convention for Colorado.

Mr. Moore gave the history of the constitution; that it was adopted in 1876 and there had been no constitutional convention since that time, although there had been many amendments.

Mr. Wood stressed the judiciary. He advocated the abolition of the county courts and the incorporation of their work in the district court; a permanent chief justice rather than the rotation of the office each two years; that the judiciary be non-political and chosen by some selective method to insure tenure in office of competent non-political judges.

Mr. Van Cise advocated the short ballot with the election of not more than governor, lieutenant governor and auditor for state offices; the elimination of many county officers and their appointment by the county commissioners; a four-year term for state and county officers; four-year terms for members of the house and six-year terms for members of the senate, with a proportionate share of these being elected every two years.

All four recommended that the present legislature pass a joint resolution submitting to the people a call for a constitutional convention.

All four also advocated that at the same time there be submitted an amendment to Article XIX of the constitution which pertains to the calling of a constitutional convention so that instead of having two members for each senatorial district there would be only one; that the members of the constitutional convention be selected by a board of five instead of having it elective and thus putting off the calling of a convention to 1949 instead of 1947.

Their suggestion as to the proposed amendment to the constitutional convention Article is as follows (the amended portions are in brackets):

"The general assembly may at any time by a vote of two-thirds of the members elected to each house, recommend to the electors of the state to vote at the next general election for or against a convention to revise, alter and amend this constitution; and if a majority of those voting on the question shall declare in favor of such convention, the general assembly shall, at its next session, provide for the calling thereof. [The number of members of the convention shall be the same as that of the senate, and they shall be selected from the same districts. They shall be appointed by a board of five members, which board shall serve without pay. Two members of the board shall be the governor and chief justice who are in office on the succeeding January 15th after a constitutional convention is ratified, and the other three members shall be elected on or before said January 15th, by the general assembly, by majority vote, in joint session, and shall consist of one representative of labor, one of agriculture and one of business, provided that not more than three members of the entire board of five shall belong to the same political party.] The general assembly shall, in the act calling the convention, designate the day, hour and place of its meeting; fix the pay of its members and officers, and provide for the payment of the same, together with the necessary expenses of the convention. Before proceeding, the members shall take an oath to support the constitution of the United States, and of the state of Colorado, and to faithfully discharge their duties as members of the convention. The qualifications of members shall be the same as of members of the senate; [vacancies occurring shall be filled by appointment by the board.] Said convention shall meet within three months after [such appointment] and prepare such revisions, alterations or amendments to the constitution as may be deemed necessary; which shall be submitted to the electors [either as an entire constitution or in parts for their ratification or rejection at an election called] by the convention for that purpose, not less than two nor more than six months after adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect."

Midwinter Meeting of the Denver and Colorado Bar Associations

A joint midwinter meeting and institute of the Denver and Colorado Bar Associations will be held in the Shirley-Savoy Hotel on February 24, 1945. David A. Simmons of Houston, Texas, President of the American Bar Association, will address the dinner meeting, which will be held at 7:00 o'clock p. m. in the Lincoln Room. This meeting is open to all lawyers and their guests. Mr. Simmons is an able speaker and a vigorous bar association president and will have an important message for the members of the bar.

At 10:00 o'clock a. m. the various committees of the Colorado Bar Association will hold meetings, at which time the Board of Governors will meet to discuss some very grave problems which face the Association. All members of the Board of Governors are urged to attend this important meeting.

At 12:15 o'clock p. m. there will be a luncheon meeting open to all members of the Associations and their guests. This meeting will be in charge of the Legislative Committee of the Colorado and Denver Bar Associations, of which Allen Moore and William E. Hutton are the respective chairmen. The meeting will feature a panel discussion of pending legislation of interest to the bar. The members of the panel will be: Senators Averill C. Johnson and Charles E. Blaine, Representatives William Albion Carlson and Clifford E. Morgan, and William E. Hutton, Harold B. Wagner and Allen Moore.

At 2:30 o'clock p. m. there will be held an institute on taxation in charge of Albert J. Gould of Denver, and an institute on real property in charge of Edwin J. Wittelshofer of Denver, Chairman of the Colorado Bar Association and Denver Bar Association Real Estate Title Standards Committees. These institutes are open to all members of the bar without charge and present an opportunity to become versed in the recent changes in the laws.

Arrangements for the meeting are in charge of Richard Tull of Denver under the supervision of Presidents Benjamin E. Sweet of the Colorado and Milton J. Keegan of the Denver Bar Associations.

Tickets for the luncheon are $1.25 and for the dinner are $2.00. Because of rationing it is imperative that reservations be made early. To secure reservations, send check to William H. Robinson, Jr., Secretary of the Colorado Bar Association, 812 Equitable Building, Denver, or to Donald M. Lesher, Secretary of the Denver Bar Association, 803 E. & C. Building, Denver.

The Need for Improved Criminal Law and Administration

BY HON. JAMES T. BURKE*

Nothing in literature seems to fascinate the human mind more than crime or detective stories.

About one hundred years ago Edgar Allen Poe wrote what is now called the "first detective story." It was a mixture of fact and fiction and, measured by modern standards for the literary form, not very attractive, but at that time it was quite successful and intrigued the public fancy. Since then Sir Arthur Conan Doyle's super-sleuth, Sherlock Holmes, has more completely captured the public imagination.

Thus, crime was dramatized and so made attractive until now we have dozens of crime story magazines, radio programs, and even comic strips, that are heard, or read, every day by millions of our people. All of this has created great public interest in crime and criminology and has developed a large number of self-proclaimed experts on the subjects. So-called experts often propound strange theories and undertake to solve the crime problem by a rule of thumb drawn mostly from their imagination.

At one time a so-called expert examined the contours of the heads of a large number of convicts in Italian penitentiaries and submitted to the world an exact formula for ascertaining a criminal human being. Shortly thereafter an Englishman applied this self-proclaimed expert's test to the students at Oxford University and obtained an identical result to that found in Italian prisons, namely, that Oxford was completely populated by criminals if the formula was correct, which, of course, it was not.

But during that period of time other significant developments were occurring in the history and science of criminology. Sir Robert Peel, a member of the English Parliament, sponsored an act creating a metropolitan police force in London. This was in the year 1829. These officers were called "Bobbies" in honor, or in derision, of Sir Robert. This was the foundation in England of orderly, scientific and professional law enforcement. The New York legislature, fifteen years later, in 1844, passed an act combining the night and day watch in New York City. Thus began the American city police system.

A number of things occurred during the past century which set back scientific law enforcement in America. One was the slavery dispute. This grew out of the failure by governors of northern states to grant extradition in cases involving escaped slaves.

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*Denver District Attorney.

Our prohibition years also brought many set-backs, but it was during this era that the art of identification was developed. Bootleggers found names as plentiful as customers and it became evident that the only scientific way to identify a subsequent offender was by his fingerprints. So, during the past twenty-five years the Denver Police Identification Bureau has grown from nothing to a huge department.

With police identification bureaus came accurate criminal records, records of modus operandi, etc., and also scientific and modern police procedure. From a study of these criminal records, both locally and nationally, various startling conclusions now become apparent to us in Colorado for the first time. Their existence makes it possible for us to learn many things which must be dealt with in our agelong battle with crimes and the criminal. For instance, we find that during the last twenty-five years the police have increased their efficiency at least 200%, and we have police universities and schools throughout the country, scientific laboratories and trained technicians, and many well educated men on our police forces.

But our crime and penal problems are growing greater despite police efficiency. During the twenty-year period next preceding 1940 the number of persons convicted of felonies and detained in institutions doubled in percentage. In 1920 we had one felon for approximately every sixteen hundred citizens. In 1940 we had one felon to every seven hundred citizens, as revealed by our police records, in spite of the increased police efficiency.

The police alone cannot deal with such an increase because they are not the only ones directly concerned in the administration of criminal justice. Our penitentiaries, reform schools, courts and district attorneys are as much, if not more, concerned. It is in improvement of the records, personnel, administration and the procedure concerning these agencies that our greatest needs exist.

As Dean Roscoe Pound of Harvard Law School says in his scholarly article entitled "Toward a Better Criminal Law,"†

> "As one studies American criminal justice in action, it is evident that the four chief factors, personnel, administration, procedure, and substantive law, must be ranked in that order in measuring their influence upon the results * * * better mode of choice and tenure of judges, prosecutors and enforcement officers, better organization of courts, better administrative methods and more adequate administrative personnel must come first in any effective program of improvement. * * * An archaic procedure and patchwork criminal law, as all experience shows, will give better results,

†Reports of American Bar Association, Vol. 60, 1935.

if well administered, than the most modern procedure and well reasoned up to date substantive criminal law, if ill administered."

It is my opinion that there are four matters in which we can greatly improve the administration of criminal justice in Colorado without the necessity of much, if any, new legislation. In the order of their importance these are:

1. A better system for the sentencing of convicted criminals to attain equality of justice and rehabilitation of persons who are sentenced. The importance of this is emphasized by the fact that a committee appointed to investigate the cause of the bloody riots in the Colorado Penitentiary in 1929 found that a major cause of the riots was in disparity in sentences between inmates.

2. Action which will improve our method of releasing convicts and returning them to society.

3. Better records in our prosecuting agencies, courts and penal institutions from which accurate and scientific statistics may be compiled akin to those now available in our police record systems in order that we may obtain a better picture of our criminal problems.

4. Greater cooperation between all of our law enforcement agencies, and complete exchange of statistical information concerning their operations.

The reform of our system of sentence is the primary need. Consider these facts in Colorado: If the police spend great time and effort in apprehending a criminal; if the district attorney successfully prosecutes him; if the jury convicts him; and if his record shows him to be a chronic offender, and the court then imposes a one-year sentence (which actually means seven months and twenty-two days) in our penitentiary, it is hardly worth while and crime is but little discouraged.

This same prisoner then enters Canon City and will undoubtedly meet an offender who has committed the same type of offense, who has no previous criminal history, but who has received a sentence two or three times as severe as the habitual offender to whom we first referred. They inevitably discuss their experiences in intensely practical language. They come to conclusions that may seem strange to us, but which, from their point of view, are not without considerable justification. Among these conclusions you will probably find these: That happenstance has more to do with the sentence imposed than the circumstances of the crime or the past conduct of the criminal; that the judge, in each instance, knew less about them than anyone else connected with the case; that their sentence was not imposed for any particular purpose save to detain them; and that the easiest way is the best way in securing an early release from the penitentiary.

These conclusions are bolstered by a survey of the records of offenders sentenced to the penitentiary from Denver during the ten-year

period ending July 1, 1943. This survey shows that forty per cent of all offenders, first, second, third or fifth, received a minimum one-year sentence. Considered in the light of the fact that the law makes the minimum sentence in some cases more than one year, plus the fact that all offenders sentenced to the reformatory (some of whom have prior felony convictions) receive the same sentence, you may conclude that two hundred fifty days or less detention is the average fate of a majority of persons convicted of felonies in Denver unless—he gets probation. A police judge with a violent disposition could deal out a more serious punishment to a defendant charged with an accumulation of violations of city ordinances and impose a more onerous and lengthy term in a county jail for such petty offenses.

This ten-year survey also shows that both reformatory and penitentiary failed to reform or make penitent eighty to ninety per cent of those sentenced.

No logical course of training for these offenders can be outlined or maintained until this business of sentences is ironed out and fully understood by all concerned.

Sentences should be long enough to serve some purpose other than to merely dispose of a defendant. They should be short enough not to destroy the potential good that can be accomplished, by resentment aroused in the sentenced. They should have a definite purpose—either the segregation of an offender for a given period of time in the hope that some physical or mental change will take place in him, or for a sufficient period to constructively train a defendant to be a better citizen upon release.

Discipline and self-restraint are best acquired by intensive training at useful work, and release from our institutions should be based on constructive progress accomplished and not upon mere negative behavior, such as a failure to violate prison rules or a failure to do anything wrong while detained.

While this is the most vital need, it leads naturally to the second, which I will discuss briefly before returning to the first.

When a prisoner is released he should be given a fair chance to work his way back into the social fabric of the community, and our antiquated system of giving him five dollars, a suit of cheap clothes, and a ticket to the place of his conviction is outrageous. Particularly in dealing with those prisoners—a majority—who are poor and friendless, some method of small pay at public work can and should be worked out.

This is particularly true because the present criminal problem is a youth problem. Statistics show the average convict to be sixteen to twenty-four years of age, of a poor family, and generally without a known trade or occupation. A majority of them cannot afford to hire

an attorney when charged, and all have been following a course of conduct, a way of life, that brings them into conflict with society and thus into the criminal court. This convict, by the word of some authorities, has committed at least twelve offenses before his first conviction takes place. This indicates that the path from good citizenship to the penal institution contains more than one step in the average case, although some defendants, in rare instances, are brought into court to answer for their first wrongful act.

The picture indicates that this typical convict, if properly handled, is potentially material for reformation and salvation.

The picture is obscured, however, by the fact that our penal institutions keep no accurate or complete records showing the end result of their efforts. You cannot tell from their records, without a complete and exhaustive survey, how many of their former inmates are in other institutions, or have failed to make good. Our reformatory records are grossly inadequate, and small effort has even been made to keep a record of inmates until the last few years. If a manufacturer could not tell you with accuracy from his records whether his product was good or bad, or his service effective or ineffective, you would not consider him quite normal, and certainly he could not succeed.

This illustrates the third need which we outlined, and which will be discussed more fully.

On the constructive side of the sentencing problem we must first consider our state reformatory act, which is wide and comprehensive. Under the rule making powers vested in the governor and delegated to the warden, a complete program of rehabilitation and education could be installed without further legislation. Prisoners could be kept in Buena Vista until they have acquired a reasonable amount of training which may enable them to hold a position upon release, or long enough at least to acquire an apprenticeship in some trade. They should, and could, receive a reasonable amount of education, discipline and training which they cannot now receive under our arbitrary two hundred fifty day commitment. In some respects the same is true of our penitentiary.

In England, under the Borstal System, when a young offender is sentenced for a course of training, the judges generally retain jurisdiction over the defendant and his case and do not make a specific commitment until after approximately six months elapse. The judges then, on the advice of the people conducting the institution, and in the light of other facts as to the length of time probably necessary for rehabilitation or training, make the sentences definite. This might be constructive as a basis for our treatment of young offenders sentenced to Buena Vista.

As to older and more hardened offenders committed to our penitentiary, it might be asked why district attorneys do not file against repeating offenders under our habitual criminal statute? The answer

becomes plain when we see that the present act only includes seven offenses, and does not operate upon such crimes as grand larceny, forgery, and many others that are the most often committed by repeaters. We need a new habitual criminal act that will embrace all felonies because all penal authorities agree that a person convicted three times of separate felonies, committed on separate occasions, needs a long sentence.

The problem of definite sentences has always vexed the minds of men, and no one has ever found a very satisfactory remedy. However, there are some things that can be done to improve our present method. We have followed a drifting policy and have done little besides talk about settling the problem.

Some states have taken away entirely from the trial judges the particular duty of imposing definite sentences in all felony cases, and have reposed it in a board. In California a judge, for all practical purposes, merely enters a judgment in accordance with the terms of the statute which fixes the minimum and maximum sentences. Later the defendant is called before a board and his release is fixed by it for a later time in accordance with its notion. The defendant must serve the minimum sentence before he can even be considered for release.

This system, however, has not worked with entire satisfaction because of favoritism alleged to have been exercised by the board without regard to the merits of the case, and other attendant evils.

Before we in Colorado go that far it is well for us to consider bettering our present system. A practice has grown up in our courts by which the trial judge considers only the evidence given on the trial in pronouncing the sentence, without regard to any other information which may be available. Sentence has been called a distinctly judicial function. I do not know where that idea came from, but when we consider the judicial function in a civil case we find that the judge must hear every bit of evidence tendered, which may have a bearing upon the issue, before the amount or the nature of the judgment can be determined by him. Why should not the same be true in a criminal case where a person's life and liberty are at stake?

It is equally important to know all probable consequences of a sentence before its imposition. I, therefore, can see nothing wrong in defendant's counsel outlining the entire history of his client to a judge in arguing for a light sentence; or, conversely, in the district attorney presenting all the facts that he knows, or can find, relative to the case. I can see nothing wrong even in the court appointing a third person to make an independent investigation of the crime, and the person charged, and then allowing the defendant a full chance to contradict the findings of the independent party. We do not need legislation to allow a judge to obtain all facts which may have a bearing upon the judgment he is

to render before sentence, so long as there is nothing concealed or unfair in their presentation. The principle of fair play should prevail, of course, and that should be the only limitation upon any party concerned.

Some of our most enlightened jurists have taken this view of the duties of the court. The late and great Justice Benjamin N. Cardozo, in his "Paradoxes of Legal Science," at page 125, says:

> "* * * Courts should feel freer than they have hitherto felt to inform their judgment by inquiry. On the other hand, the very need for such inquiry is warning that in default of full disclosure of the facts, there should be submission, readier than has sometimes been accorded, to the judgment of the lawmakers. The presumption of validity should be more than a pious formula, to be sanctimoniously repeated at the opening of an opinion and forgotten at the end."

Justice Oliver Wendel Holmes used this language in the celebrated Chastleton Corp. v. Sinclair case, 264 U. S. 543, at 548:

> "We repeat what was stated * * *, as to the respect due to a declaration of this kind by the legislature so far as it relates to present facts. But, even as to them, a court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. * * *"

In many instances we have a young man to deal with who, due to parental neglect, has been virtually raised in public institutions. He has thus acquired quite a record which, when closely examined, indicates merely that he never had a chance to learn anything which would enable him to earn a livelihood, or to make something of himself. This should be considered.

A judge is not necessarily an expert on criminology by virtue of his office, any more than he is an expert in engineering, medicine, or the manufacture of automobiles. If he properly evaluates the evidence and the circumstances presented to him, he has done very well. In other words, I believe in a fair sentencing system whereby these facts are all laid before the court:

> 1. The course of training available for the defendant in our institutions, and the length of time that the average man needs to complete that course of training.
>
> 2. All facts which may indicate the adaptability of the defendant to that course of training.

If necessary, the court should retain jurisdiction of the case until each and all of these facts are learned.

There is nothing new in this proposal. It is what the federal courts have attempted to accomplish in their jurisdiction. It would in no way

interfere with the judicial function, but would tend to make it more symmetrical and effective. It would establish a cooperative process akin to our present probation operations in Denver under which only about 13% of those granted probation violate its terms during the probation period.

The third and fourth needs outlined are more or less entwined.

It is from our improved police records that we can draw salient facts concerning our crime problem today. If this improved bookkeeping should be extended to the other departments involved in the administration of criminal justice, we would, in the course of a few years, vastly improve that administration. Criminal administration requires a singleness of purpose and unity of action by all concerned therein: the police, the district attorney, the judges of the courts, and those in charge of our penal institutions. Improved records of all of the activities of these will lead to vastly increased common knowledge and unity.

The old saying, "When thieves fall out honest men get their due" is reversed when officials administering justice oppose each other, fall into controversy because of lack of mutual accurate knowledge, or fail to cooperate. Then thieves reap their harvest. All parties engaged in the administration of criminal justice are allies of either the law or the lawbreaker. There is no middle ground.

If all follow the law and the sure common experience with reasonable discretion, the job will be done. If each follows his own prejudices, peculiarities and beliefs, which are not based upon study of accurate criminal statistics, justice will be poorly administered, if not thwarted. Complete, accurate and scientific record systems will promote cooperation.

No system of criminal justice can be effective that is not under constant investigation and study. More detailed, accurate and scientific records must be kept by our police agencies, our district attorneys, our judges and courts, and our prison officials. All of these should be brought to light in reports and surveys at least once each year, and subjected to fair criticism in order that changes may be made from time to time in the operations of the system as the experience gained indicates.

Unfortunately, with us, the most discussed criminal problem is the question of pardons and paroles, but it does not merit public attention and is really a minor problem in the field. Out of the thousand prisoners confined in the penitentiary approximately six hundred have only a few months to serve. They are thus removed from consideration for pardon or parole by this fact. There cannot be more than two or three hundred that should be considered for a reduction of sentence.

The powers of clemency are vested in the governor, an elected official responsible to the people, by our constitution.

I believe little benefit can be derived by the appointment of a board to tell him what to do, whose advice he may accept or disregard. A small amount of clerical help could investigate these cases and dispose of the advisory function. However, it might be handy for the governor to have such a board to absorb the grief that goes with the function, but this could be equally well accomplished by passing the buck to a competent clerk.

Presently, under our system, our governor writes to the judges and district attorneys when considering a pardon or parole, requesting their recommendation. After he receives these he does as he pleases. If the letter can be used to good advantage to explain his action in the case, he uses it, if not, he files it.

Relatively little legislation is required to effect the four improvements in criminal administration which I have discussed, and some others possible. Those which might be considered are:

1. A comprehensive habitual criminal act. It should be simplified to omit second offenders and should impose a heavy uniform minimum sentence for third offenders; it should include all felonies and not a specified few, and should make criminal records prima facie evidence.

2. An act permitting our courts to retain jurisdiction over young defendants for up to six months after remanding them to the institution in which they are to serve, before fixing the maximum term.

3. An act placing the reformatory and the penitentiary under one administrative head, say the attorney general, and integrating their activities so far as practicable.

4. Legislation creating a women's reformatory. This can be done by authorizing the Morrison school for girls to take those whom they see fit, for the training given there.

5. An act providing public work for which prisoners can receive some small pay upon their release from the penitentiary, and abolishing the infamous "$5.00 and a suit of clothes" practice as the sole start given in a new world for the penniless inmates upon their release.

6. Legislation, appropriations at least, to establish a training and educational program along modern lines in our boys' reformatory, and legislation giving a fixed term instead of an indefinite sentence, as now. This "indefinite sentence," by the way, is in fact very definite presently—it is the minimum possible.

I present no panacea for the cure of ailments afflicting our administration of criminal law. That additional facts are needed and desirable I am certain; that conditions which cry out for reform are present is apparent. Their cure must be the result of carefully considered action on a cooperative basis between our law enforcement officers, prosecutors, courts, penal institutions and our legislature.

To again quote Dean Pound,

"We * * * have all but left the field (the reform of our criminal law) to enthusiasts and cranks and charlatans * * *.

"* * * Research in criminal law and procedure must go on cooperatively with research in the whole field of criminal justice—criminal investigation, police and preventive criminal justice, prosecution and the organization of criminal tribunals, * * * the causes of crime, physical, social and economic, and penal treatment * * *."

In the interest of common humanity, better protection for ourselves and our property, and the preservation of our fundamental rights, I feel that some action is necessary. It would be a privilege to assist the bar in securing an improved criminal administration in Colorado.

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Some Notes on Criminal Justice†

BY HON. G. A. LUXFORD*

When District Attorney James T. Burke extended the invitation to address you he said, "Oh, talk about anything you think will be instructive."

Giving instructions to juries is one thing, but to attempt to give instructions to this distinguished group of lawyers, district attorneys, judges and United States army officers—well, I am not so sure about that. Which reminds me of one spring on the ranch when we were building fence. One of the men said, "You know, anyone can set two fence posts in a row, but the hell of it is to line three of them up." What application that has here may soon appear.

All of us here today have a common interest, which is to see that the administration of criminal justice in Colorado is progressively conceived and executed in the interest of the public, the taxpayers, the bar, and those most vitally interested of all, the defendants appearing before the bar of our courts.

Personally, I have always regarded the law as a living, growing thing. Our government is not an edifice; it is an institution, and it has been said that institutions are but the lengthened shadows of men. Dean Pound has said, "Law must be static, yet it cannot stand still." And Justice Holmes concluded that "The life of the law has not been logic; it has been experience." And yet again, Justice Cardozo wrote, "The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth."

It has been said by eminent authorities that the criminal law has lagged in its development. Even so, looking at it across the years it has made slow but steady growth. Less than a century and a half ago there were 160 crimes under the English law visited with the penalty of death; and in 1801 a child of thirteen was hanged at Tyburn in free England for the larceny of a spoon.

We have come a long way since then. Now we all agree with what our own Justice Haslett P. Burke said, "The first duty of an appellate court is to make the law the thing which our ancestors believed it should be, an instrument for the promotion of human happiness and the doing of human justice."

It is my belief that since we have introduced the humanities into our administration of criminal law that crime has diminished and that our criminal population has decreased.

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†An address before District Attorneys Association, Colorado Springs, October 13, 1944.

*Judge of the Denver District Court.

In Colorado in the past few years we have taken one more great step which has introduced humanity into the administration of criminal justice. I refer to our present probation statute, not perfect by any means, but nevertheless a wise and humane law, which, under proper administration reduces crime and the number of criminals, and which tempers justice with mercy, not only in the interest of defendants but of the people as well. The benefit of our probation statute is that it tends to reduce inexorably the number of habitual criminals of mature years, because it can, and does, divert and redeem scores and hundreds of youths from a life of crime, who otherwise have in the past, for the most part, adopted crime as a career after incarceration for first offenses. Our crime problem in Colorado, and in the nation, is a youth problem. It is a problem for law enforcement officers, lawyers, judges, and legislators.

United States Circuit Court Judge Orie L. Phillips says: "Reliable statistics demonstrate beyond possibility of doubt that the period of life between 16 and 23 is the focal source of crime. It is during that period that habitual criminals are spawned. Young people between the ages of 16 and 21, inclusive, constitute but 13 per cent of our population above the age of 15; but they are responsible for approximately 26 per cent of our robberies; they constitute in excess of 40 per cent of our apprehended burglars, and nearly 50 per cent of our automobile thieves. Boys from 17 to 20, inclusive, are arrested for major crimes in greater numbers than persons of any other four-year group.

"They are arrested for serious crimes twice as often as adults of 35 to 39; three times as often as those of 45 to 49; and five times as often as those of 50 to 59.

"Nineteen-year-olds offend more frequently than persons of any other age. Eighteen-year-olds come next. Moreover, the proportion of youths less than 21 in the whole number of persons arrested is increasing at an alarming rate. This tremendous upsurge of criminality during the youth period is a startling social phenomenon. It would seem, therefore, that we must wisely concentrate our efforts to prevent crime upon the offenders in the age group between 16 and 23 if we are to make progress in the solution of our crime problem."

Our probation statute applies only to first offenders, and hence principally to the age group referred to. That it has been beneficial, under proper administration, can be proven and not merely surmised. A ten-year survey made recently by District Attorney James T. Burke of the administration of probation in Denver shows these facts: 1152 persons were granted probation. Out of that number only 245 or 21% had their probation revoked. In other words, probation was a success in 79%, and 79% of the first offenders granted probation were redeemed to society as more or less useful citizens, with a consequent saving to this state of an incalculable moral value, plus many thousands of dollars

in cash, because of the reduced population of our penitentiary and reform schools. Reduce that to even 50% and probation remains a great and successful reform.

Why has probation been a success in Denver? Primarily, because there has been a complete cooperation between the police officers, the district attorney, the judges of the courts, and the probation officers who have supervised the administration of the law. Probation without wise, experienced, sensible and diligent probation officers who believe in the value of probation is apt to be a failure. In Denver, when an application for probation is made, an investigation of the applicant's life from the cradle on, is made by the probation department. His personal and family history is determined not only by what he says, but by what the record shows. His education, his church and social activities, school history, previous employment, marital status, and, in fact, his whole life, are surveyed through references which he gives, and through other sources. These probation officers are shrewd and practical men, some of them former police officers, but all with a great knowledge of life, and a faith in probation. When they recommend the grant or denial of probation, it is upon a basis of knowledge and not one of sympathy, prejudice, influence or hearsay. Most of the bad probation prospects are thus culled from the herd before probation is granted. This is essential. No man should have probation for any offense whose life, character and personality disclose that he is a bad probation risk.

In Denver our judges and the district attorney have almost uniformly followed the recommendations of the probation department concerning the granting of probation, and I believe this to be sound policy. Second, it is even more essential that the person once granted probation shall be supervised diligently. To grant probation and turn the man loose to return to his former associates, habits and temptations is folly. A probation officer must be firm, diligent and wise in order to make this supervision efficient, but I am convinced that it is the work of supervision by the probation officers which has made the administration of probation in Denver what it is.

I personally feel that on the basis of our experience in Denver that the probation officer should be an independent officer, not connected directly with the apprehension or conviction of criminals. It is a full time and not a part time job. Police officers usually make excellent probation officers.

What the experience over the state may indicate I do not know, but I do believe, and I think that you will all agree, although not perfect, that our probation statute administration in Colorado has resulted in a great step forward in the administration of criminal justice.

Opinions differ as to what further legislation could do to increase its efficiency. This is a field which should be surveyed carefully by those most interested in the forward progress of the law, and I refer (1) to the law enforcement officers of the state, (2) the district attorneys, and (3) the judges. This suggests another change in the administration of our criminal laws, and that is a *closer* coordination and cooperation between the law enforcing agencies, the prosecuting agencies, the courts, and the penal and reform institutions of our state. As the situation now exists, the police officer knows little or nothing of what becomes of the man whom he apprehends and charges, and his misunderstandings of what results in the next step of the process are manifold. No statistics on a state-wide basis are available to him concerning the percentage of convictions obtained by his efforts, the length of sentences, the percentage of probations, the time and number of paroles, or the final disposition of the case of the man against whom he testifies.

Similarly, the district attorney and the judge do not have available to them information which would indicate the result of their efforts to suppress crime or to reform criminals, for the direction of their future policy and efforts.

Under our present sentence and parole laws our judges, I fear in some instances at least, know not what they do when they sentence a man to the penitentiary for a term of from one to ten years. They do not know, in many instances, how long he may be incarcerated, and no statistics exist which would indicate what the average criminal does after his discharge. Until all of these various agencies achieve a central information and statistical organization which can fully inform all of the component parts of the business of law enforcement as to what their common problems are, and what the statistical results of their efforts are, confusion is bound to continue. A close coordination of information and statistics among our various law enforcement bodies would reveal many things which can be corrected or improved in the functioning of our law enforcement.

I believe that great benefit would come from the creation of such an agency, either by law or by cooperation among the state groups.

But certainly the greatest need for change in our administration of the criminal law is a complete overhauling of our sentencing and parole system in Colorado. Today when a judge sentences a man to from one to ten years in the penitentiary, it actually means one year, less a so-called "good time allowance." The man sentenced actually serves only a little over seven months. He then is entitled to release by law.

What to do about it? I have this belief, that the maximum sentence for a crime in this state should be drastically reduced. The minimum sentence imposed should be served in the penitentiary and no so-

called "good time allowance" should be awarded to a convict for mere negative, failure to do anything bad, while in prison. The minimum sentence should carry with it, by law, a provision that the man after serving the minimum sentence should be on parole for the same length of time and with the same sort of rigid supervision and constructive assistance *by parole officers* that is given to the person now granted probation. As our law now exists, the convict's minimum sentence is whittled down from the day of his incarceration so long as he fails to do anything wrong, and by law he is entitled to release at the conclusion of his minimum sentence, less the so-called "good time." He is then dumped out into the world with a new suit of clothes and $5.00 and allowed, yes—frequently forced to return to the associates, the environment and habits which were his when he committed the crime for which he served.

The needed legislation should be drafted upon facts obtained from the combined experience of police officers, district attorneys, judges, state and federal, and the wardens of our penal institutions.

The report of the subcommittee of federal judges on the sentencing of adult offenders to the committee on punishment for crimes, appointed by Chief Justice Stone of the United States Supreme Court, says:

> "Further, as a result of the studies we have made we have concluded that there is a type of disparity in sentencing which is unjust. . . . In dealing with the same crime by different individuals similarly situated, while disparity of sentence may be proper, there should be no shocking disparity. Judges who crusade against certain crimes which they feel disposed to stamp out by drastic sentences create unfortunate reactions, when such sentences are compared to less severe sentences for more serious crimes.
>
> "It has been argued, what difference does it make if convicts are discontented? Granting that this question may not be satisfactorily answered—which doubtless is not true—nevertheless any action by the courts is wrong which is inherently unfair. The reaction of the convict is not the sole complaint; his family, his friends, and fair-minded persons in the public, the courts, and the penal system join to condemn that which on no basis can be justified as just and equal treatment."

And further, quoting from the same report:

> "Undoubtedly in recent years there has been improvement in the method of sentencing in the federal courts. This has come about largely through the availability to the judge of presentence reports made by probation officers."

The committee recommends inter alia:

> "2. Where the sentence, in the opinion of the judge, should be for more than 1 year, require that a sentence for the maximum

term be initially imposed, with power in the judge to modify the sentence later.

"3. Provide a board of corrections with power to make recommendations to the judges as to sentence in cases where sentence is for more than a year, but with power in the judge to fix the sentence notwithstanding the recommendation of the board."

Every judge intends that the sentence imposed shall be fair and just.

Disparity in sentences does not necessarily mean injustice. Each case is an individual case, calling for such sentence as the facts warrant. The report of the federal judges above referred to recommends giving the judge full and complete information before final sentence is passed. No doubt every judge would welcome this.

This is a field which challenges the sincere efforts, the deep thought, and the hard work of every police officer, district attorney, and judge in the State of Colorado.

I believe that this group is properly qualified by experience, intelligence, and sincere interest to lead in the doing of this job.

We are called upon to do our part in an ageless process of administering justice today. Justice should be a strong and firm but also a humane thing. We now serve as public officers. Yesterday others served, and tomorrow still others will take up the work where we leave off. If through patient industry our service leaves the state a little better than we found it, then indeed will we be amply repaid.

Real Estate Title Standards†

BY EDWIN J. WITTELSHOFER*

No greater opportunity has presented itself to the Colorado Bar Association in many years for beneficial and constructive service to the members of the legal profession as well as to their clients than will result from the establishment of uniform standards concerning the examination of titles, provided these standards are uniformly accepted and courageously applied. This is not mere fantastic thinking or conjecture, but is based upon the practical results obtained by the Denver Bar Association and the bar associations in other parts of the State where standards have been promulgated and applied.

Not only in our own state but in five or six other states like plans have been established and with like results. The Real Estate Section of the American Bar Association has given attention to this plan and last year the chairman of the Denver committee was invited to attend a meeting of that section at which time the plans was under discussion.

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†An address before Colorado Bar Association, October 13, 1944.

*Of the Denver Bar, Chairman Real Estate Title Standards Committee

The importance of constructing a working plan which will bring uniformity, practicability and good common sense in the conclusion of lawyers concerning the marketability of real estate titles cannot be overestimated. It is probable that more people come in professional contact with the members of the bar and the operation of law in connection with the sale or mortgage of real estate than in any other branch of legal jurisprudence. The Recorder of the City and County of Denver reports that for the first six months of 1944 over 8,000 trust deeds, warranty deeds, and quit claim deeds were placed of record in his office alone. It seemingly follows that the prestige, respect and consideration of our profession is established in no inconsiderable degree upon the fairness, uniformity, practicability and sanity with which we carry on the work of title examinations.

The situation which confronts the conscientious and responsible title examiner in this regard is pretty well known and experienced by all lawyers whose practice includes title examinations. The extent to which lawyers are now magnifying mere irregularities in titles and demanding correction by suits to quiet title has reached a point almost beyond belief. By way of illustration, recently title was rejected and corrective suit required because in the legal description of a deed the word "addition" was used in place of "subdivision" there being no other addition or subdivision of like or similar name. Again, a resident of the City of Denver purchased a home thirty-three years ago, had his title examined by one of the most reputable legal firms of that day, and lived in the house continuously since the date of purchase without change in its ownership, but on attempting to sell the same was informed that his title was defective and he was asked to bear the expense of a suit to quiet title—this because of some trifling irregularity in an estate through which title was deraigned administered over fifty years ago. What can such a man think—what faith can he have in law and lawyers? How can the prestige of the legal profession be maintained in the light of such circumstances? These illustrations are not hypothetical but actual cases. They are not isolated incidents but have been repeated in the practice of all of you present here today time and time again.

Not so many years ago a lawyer in examining an abstract spent his time and effort in determining if for all practical purposes the title was good and merchantable, but now he must project himself into the field of prophecy and attempt to determine what other lawyers will do in regard to the merest irregularity or purely technical objection in connection with the title in question. There has come to be little distinction between mere irregularities and vital defects. All too many lawyers now seem to believe that they are employed to find out what is wrong with the title rather than to determine if the title is good.

No so many years ago a suit to quiet title, even among those lawyers whose practice consisted principally of title examination, was considered a strange interlude, but today it has become a mere commonplace. Nor can it be said that the supertechnical viewpoint above expressed is now limited to a few lawyers. It may have begun with a few but from necessity the circle widens. From a few it encompasses all, for the practical lawyer must protect himself when all standards of practicability are removed. Unless such a situation is cured, we may logically be charged with being either unmindful of our responsibility or ignorant or forgetful of our duties.

It now frequently happens that a title is rejected by one examiner for no other reason than that it may be rejected by a subsequent examiner. If, however, it could be determined in advance what attitude will be taken by such subsequent examiner, no objection would be made. It is the prime purpose of the plan of setting up title standards now in operation in some parts of the state to determine in advance what that attitude will be.

Again, much difficulty arises from a lack of uniformity among examining attorneys in regard to what is or should be required of record to make a merchantable title. By way of illustration: some lawyers insist that a certified copy of letters be placed of record in sales of property under order of court, notwithstanding the order of confirmation of sale; or that the assignment of a public trustee's certificate of purchase be required of record in passing title, while other lawyers desiring to relieve against the steady increase in cost of abstract entries are not requiring such recordation. It is perhaps not of supreme importance whether such instruments be recorded or not, but it is important that uniformity be established with reference thereto. Many a lawyer has been subjected to his client's criticism because he has applied common sense and sane judgment in his endeavor to save for his client unnecessary cost and expense.

Much of the difficulty of the present situation arises from the viewpoint of the lawyer in respect to his duty as a title examiner. He fails to realize that he is asked for an opinion as to the marketability of a title and not as to its perfection or imperfection. He is protected under the law if he has used the care of a reasonably prudent title examiner. When there is no controlling statute or specific law in decided cases the common practice of lawyers in the community may be properly considered. Necessarily then, the failure of his protection comes from his own associates who fail to exercise an independent judgment in regard to particular irregularities in the title. The opportunity of affording such protection arises from the promulgation and operation of standards of title such as are now in operation in Denver and in other communities

of the State. The success of such a plan depends upon the backing of the bar as a whole.

In Denver and in the other communities where said plan is now in operation, accomplishments of great importance have been obtained through the setting up of standards for the guidance of all title examiners. These standards have been established based upon actual problems all taken from the experiences of the members of the bar. None are hypothetical cases. Some may seem altogether too simple and to many may appear to be unnecessary, but it must be remembered that what may seem negligible in importance to many may appear of great importance to the few, and through the action of those few become important to all, and so we should seek to eliminate as many differences as possible with respect to all problems, be they great or small.

In undertaking a plan for setting up standards reliance must be had upon the presumption that lawyers engaged in this branch of labor are reasonably prudent title examiners. If this premise be accepted it follows that the standards which are set up more or less in the form of a code, after careful study, investigation and conference among the representatives of the bar association selected for that purpose, should and will be accepted by all title examiners. That they will be given practical effect by the court and received in evidence as the common practice of lawyers in that community we have no doubt, and once in evidence it will take considerable temerity upon the part of a lawyer to risk his professoinal reputation by testifying as an expert witness that those standards cannot be relied upon and followed by reasonably prudent examiners.

Notwithstanding the fact that some of the standards which have or may hereafter be set out are based upon no statute or decision of court to sustain the answers, yet this should not defeat their effectiveness or actuality. Unless and until ultimate decision is rendered they will stand as the common practice among examiners in their community and can be relied upon with safety by all title examiners.

The only apparent weakness in the plan proposed may be the failure of our members generally to support these standards once they are set up. If they are adopted and relied upon they will to a large extent bring harmony and understanding among ourselves and between ourselves and the public.

It perhaps should be again emphasized that reliance upon these standards does not involve the assumption of new risks but rather eliminates the constant fear now hanging over the heads of every one of us.

It is quite likely that the inspection of some of the standards now promulgated and in use in Denver will demonstrate the practicability and usefulness of this plan.

Upon Information and Belief

Amending the Constitution

Considerable interest in re-writing or amending the Colorado Constitution has been evidenced during the past two months. There are before the Constitutional Amendments Committees of the Colorado House and Senate, over thirty proposals for amendments to the Constitution. Some of these are, of course, duplicates, but there are a sufficient number of individual suggestions before these committees which if separately enacted, would go far toward changing our fundamental law. There are also before these committees proposals to call a constitutional convention. One group of able advocates recommends the calling of a convention to re-write in its entirety the Colorado Constitution. Another group of able advocates recommends placing on the ballot several amendments to the Constitution aimed at those provisions about which there is the greatest discussion. There are others who, regardless of whether or not a call for a constitutional convention be placed on the ballot, feel that it is necessary to place certain amendments on the ballot at the next election. These persons argue that there are certain fundamental issues which must be determined before a constitutional convention will know what provisions to write into the new constitution, and also that in view of the length of time that it will take to call a constitutional convention and adopt a new constitution and the possibility that the new constitution might even then be rejected, certain of the major amendments should be made immediately and without regard to a constitutional convention.

We trust that the voice of the lawyers will be heard in the discussion of what amendments are to be placed upon the ballot.

IN MEMORY OF COLORADO LAWYERS WHO HAVE GIVEN THEIR LIVES IN THE SERVICE OF THEIR COUNTRY

CHARLES W. DELANEY, JR.
DONALD J. GILLIAM
JAMES G. LANG
ALVIN L. ROSENBAUM